

CHAPTER 10

CRITICAL CIRCUMSTANCES

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LIST OF ACRONYMS & ABBREVIATIONS

|                          |                                                          |
|--------------------------|----------------------------------------------------------|
| CFR                      | CODE OF FEDERAL REGULATIONS                              |
| DOC                      | DEPARTMENT OF COMMERCE                                   |
| FR                       | FEDERAL REGISTER                                         |
| GATT                     | GENERAL AGREEMENT ON TARIFFS AND TRADE                   |
| ITC                      | INTERNATIONAL TRADE COMMISSION                           |
| SAA                      | STATEMENT OF ADMINISTRATIVE ACTION                       |
| ANTIDUMPING<br>AGREEMENT | AGREEMENT ON INTERPRETATION OF ARTICLE VI<br>OF THE GATT |
| THE ACT                  | THE TARIFF ACT OF 1930, AS AMENDED                       |

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References:

- The Tariff Act of 1930, as amended (the Act)
  - Section 733(e) - preliminary determinations
  - Section 735(a)(3) and 735(c)(4) and 735(c)3 - final determinations
- Department of Commerce (DOC) Regulations
  - 19 CFR 351.206 - preliminary and final determinations
- SAA
  - Section C.8.a. - critical circumstances
  - Section C.8.b. - time limits on retroactive assessments
- Antidumping Agreement
  - Article 10.6 - retroactive duties

**INTRODUCTION**

If there are affirmative preliminary determinations of dumping and injury an importer of a product under investigation must normally post a bond or deposit estimated **dumping** duties with U.S. Customs. The starting date of suspension of liquidation and posting of a cash deposits or bond is the date of publication of an affirmative preliminary determination in the Federal Register (FR). In anticipation of high preliminary dumping duties, the importer may deliberately import and stockpile large quantities of a product under investigation in order to avoid the possible payment of antidumping duties.

Usually, an importer may enter a product under investigation without risk of liability for assessed antidumping duties during the period between the date of publication of initiation of an investigation and an affirmative preliminary determination. However, section 733(e) of the Act and 19 CFR 351.206 provide for a 90-day retroactive suspension of liquidation which the Act allows under “critical circumstances.”

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### **I. SUBMISSION OF ALLEGATION**

Petitioner may allege critical circumstances in the petition or by amendment to the petition at any time but no later than 21 days before the date of the final determination. Petitioner must include factual information such as import data to support the allegation (see section 733(e) of the Act).

### **II. BASES FOR CRITICAL CIRCUMSTANCES FINDING**

In accordance with Section 733(e) of the Act, we determine critical circumstances to exist if there is a reasonable basis to believe or suspect the following: 1) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the **subject merchandise**; or 2) the importer knew or should have known that the exporter was selling the subject merchandise at less than fair value and that there was likely to be material injury by reason of such sales; and 3) there have been massive imports of the subject merchandise over a relatively short period of time.

#### **A. Critical Circumstances Criteria**

##### **1. History of Dumping and Material Injury**

For the history of dumping, we examine recent antidumping duty cases of the product under investigation in the United States or elsewhere (see Final Determination of Sales at Less Than Fair Value: Welded Stainless Steel Pipe from Malaysia, 59 FR 4023 (January 28, 1994)). The Office of Policy is responsible for researching whether there are any outstanding antidumping orders for the product under investigation in countries other than the United States. The primary source of this information is the Semi-Annual Report to the Committee on Antidumping Measures published by GATT.

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The need to examine the history of material injury is a 1994 addition to this criterion. See section VI of this chapter, "Sharing of Responsibilities With the ITC," for information on determining the history of material injury.

2. Importer Knew or Should Have Known that Exporter Was Selling at Less Than Fair Value and There Was Likely to be Material Injury.

In order to determine whether or not the importer of a product under investigation knew or should have known that the exporter was selling the product at less than fair value, we use the estimated margins in our determinations as a guide. We consider the following estimated margins to be sufficient to "impute knowledge" to the importer:

- a. estimated margins of 25 percent or greater if the exporter sells to an unaffiliated company in the United States (export price situations); or
- b. estimated margins of 15 percent or greater if the exporter sells to an unaffiliated company through an affiliated company in the United States (**constructed export price** situations).

See the Final Determinations of Sales at Less Than Fair Value for Ferrosilicon from Brazil, 59 FR 732 (January 6, 1994); Disposable Pocket Lighters from the People's Republic of China, 60 FR 22359 (May 5, 1995), and Manganese Sulfate from the People's Republic of China, 60 FR 52155 (October 5, 1995).

See section VI of this chapter for information on the importer's knowledge of the likelihood of material injury.

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## 3. Massive Imports Over a Relatively Short Period of Time

As specified in 19 CFR 351.206(h), we consider the following factors in determining whether imports have been massive:

- a. the volume and value of the imports;
- b. seasonal trends (if applicable); and
- c. the share of domestic consumption accounted for by imports.

As outlined in 19 CFR 351.206(h)(2)(i), we consider at least a three-month period, beginning with the filing of the petition, as a relatively short period of time. We generally consider the period beginning with the filing of the petition and ending with the preliminary determination. We then compare this period to a period of equal duration immediately prior to the filing of the petition to determine whether imports had been massive over a relatively short period of time. However, if it can be substantiated that the importers or exporters of the product under investigation had prior knowledge of the filing of the petition, we can consider a period including the time prior to the filing as part of the "post-petition" period.

If the petition is filed in the first half of the month, that month should be considered part of the "post-petition" period. If the petition is filed in the second half of the month, that month should be considered part of the "pre-petition" period. For the purposes of our preliminary determination, we base our massive imports determination on the data available from the questionnaire response. The respondents must submit updated data for massive imports through the date of the preliminary determination prior to our **verification**.

As stated in 19 CFR 351.206(h)(2), we consider imports of the product under investigation to be massive if there has been an increase of 15 percent or more over a relatively short period of time. However, the determination of massive imports is more than a single comparison of import levels before and after

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filing of the petition. We must also examine trends over time and determine whether there is seasonality with respect to the imports.

#### 4. The “All Others” Category

If we find that critical circumstances exist for all companies that we investigate, we will normally find that they exist for companies included in the “All Others” rate category. Likewise, if we find that critical circumstances do not exist for all companies, we normally find that they do not exist for companies in the “All Others” category. For situations where critical circumstances are found for only some of the companies investigated, consult with your supervisor or PM. In Final Determination of Sales at Less Than Fair Value: Certain Steel Concrete Reinforcing Bars from Turkey (“Rebar from Turkey”), 62 FR 9737 (March 4, 1997), the DOC found critical circumstances for the “All Others” category producers and exporters because it found critical circumstances for three of the four companies investigated.

### **III. COLLECTION AND VERIFICATION OF DATA**

To collect this information, we request respondents or U.S. Customs to provide shipment data for the product under investigation.

#### **A. DOC Requests**

If the critical circumstances allegation is submitted prior to the transmittal of our questionnaire, we include a request for company-specific shipment data in our questionnaire. If the critical circumstances allegation is submitted after the transmittal of our questionnaire, we either include our request for data in a supplemental questionnaire or a separate letter. We request all companies to submit data for two complete years and all months of the current year up until the date of publication of the preliminary determination in the FR. Companies are required to submit all available data and provide additional month’s data as they become available.

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In some situations, we request Customs to compile information on an expedited basis regarding entries of the subject merchandise (see 19 CFR 351.206(g)). Always consult with your supervisor or program manager (PM) and Import Administration's Customs Liason Team before making one of these requests.

#### **B. Verifications**

We check the accuracy of all data submitted by the respondents and used in our massive imports analysis at verification. If we are unable to verify the data submitted by the respondent and we conclude that the respondent has not cooperated to the best of its ability, we assume that imports have been massive for the purposes of our massive imports determination (see Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings from Malaysia, 60 FR 10550 (February 27, 1995)).

### **IV. PRELIMINARY FINDINGS**

#### **A. Retroactive Suspensions of Liquidation**

For an affirmative critical circumstances finding, the effective date of the suspension of liquidation is 90 days prior (retroactive) to the date of publication of an affirmative preliminary determination unless the date of initiation of the investigation occurred on a later date. If this is the case, liquidation is suspended from the date of initiation. Even though the merchandise represented by an entry may have long since left the custody of Customs if the entry was filed within the 90-day, retroactive period and if the entry has not been liquidated, the importer may be liable for antidumping duties on that entry.

#### **B. Issuance of Findings**

If the critical circumstances allegation is made 30 days or more before the final determination, the Department will issue a preliminary critical circumstances finding in one of the following ways:

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1. If the allegation is filed 20 or more days before the preliminary determination, then the DOC must issue its preliminary finding no later than the preliminary determination; and
2. If the allegation is submitted later than 20 days before the preliminary determination, then the DOC must issue its finding within 30 days after the submission.

## **V. FINAL FINDINGS**

### **A. Affirmative Final Findings**

In the event of an affirmative final critical circumstances finding, section 735(c)(4) of the Act requires that one of the following three procedures is applied:

1. If the preliminary and final critical circumstances findings are both affirmative, then we direct Customs to keep the retroactive suspension of liquidation ordered in the preliminary determination in effect
2. If the preliminary critical circumstances finding is negative and the final finding is affirmative, we direct Customs to put into effect a 90-day retroactive suspension of liquidation period from the date of publication of and affirmative preliminary determination in the FR.
3. If the preliminary determination is negative but critical circumstances is affirmative, we direct the Customs Service to put into effect a 90-day retroactive suspension from the date on which suspension is first ordered

### **B. Negative Final Findings**

In the event of a negative final critical circumstances finding, section 735(c)(3) of the Act requires that one of the following two procedures is applied:

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1. If the preliminary finding was affirmative and the final finding is negative, we will end the retroactive suspension of liquidation ordered at the preliminary determination, and will instruct Customs to release the cash deposit or bond for entries made during the 90-day retroactive period.
2. If there is no preliminary determination and the final finding is negative, no Customs directive is required.

## **VI. SHARING OF RESPONSIBILITIES WITH THE ITC**

### **A. Background**

Section 733(e)(1)(A) of the Act directs the DOC to determine whether (i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or (ii) the person by whom, or for whose account, the merchandise was imported, knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales.

The bifurcated responsibilities of the DOC and the ITC in antidumping investigations have otherwise required all issues relating to material injury to be resolved by the ITC. It is the ITC that examines the sales of merchandise in U.S. markets. The DOC does not normally collect this type of information. Each agency has conducted separate investigations and established separate administrative records that have minimal overlap. However, the DOC is now required to develop information regarding material injury for a critical circumstances finding. In implementing this responsibility in the first two investigations involving this provision, the DOC did the following: 1) In Rebar from Turkey, at 9741, the DOC found that a history of dumping in another country was sufficient to establish material injury in the United States, and 2) in Final Determination of Sales at Less Than Fair Value: Brake Drums and Brake Rotors from the People's Republic of China, 62 FR 9160 (February 28, 1997), the DOC found that a preliminary determination of present "reasonable indication of material injury" for these cases by the ITC was sufficient to fulfill the material injury requirement of the critical circumstances

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provision. The DOC also stated in this FR notice that an ITC preliminary finding of threat of material injury would not be sufficient to fulfill the critical circumstances requirement.

Because the material injury provision may evolve as more critical circumstances cases are received, you must consult with your supervisor or PM to determine what information is necessary to make this determination for your investigation.

#### **B. Preliminary Determinations**

By the time of the DOC's preliminary determination of critical circumstances, the ITC's preliminary determination of material injury will have been made. Thus, the DOC should be in a position to obtain data regarding material injury from the ITC to make a critical circumstances decision.

#### **C. Final Determinations**

In the case of the final determination, however, the DOC's final critical circumstances determination will have to be made before the ITC has made its final injury determination. Thus, the DOC will not be able to use for its final determination the information that the ITC uses for its final determination. Therefore, the DOC will have to use the best information at its disposal to complete the final critical circumstances determination.

### **VII. CRITICAL CIRCUMSTANCES FINDINGS BY THE ITC**

In the event of a final affirmative critical circumstances finding by the DOC, the ITC must also address the issue of critical circumstances in its final determination. In accordance with section 735(b)(4) of the Act, the ITC determines whether the imports subject to an affirmative critical circumstance finding are likely to undermine seriously the remedial effect of the antidumping duty order.

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### **A. The ITC's Decision Criteria**

In making its critical circumstances finding, the ITC considers:

1. The timing and the volume of the imports;
2. whether there has been a rapid increase in inventories of the imports; and
3. any other circumstances indicating that the remedial effect of the antidumping order will be seriously undermined.

### **B. Final Findings by the ITC**

Depending on the final finding by the ITC, one of the following actions will be taken:

1. For an affirmative critical circumstances finding by the ITC, the DOC directs Customs to keep the 90-day, retroactive suspension of liquidation in effect.
2. For a negative critical circumstances finding by the ITC, the DOC cancels the retroactive suspension of liquidation, and directs Customs to return all cash deposits or release all bonds for entries made during the 90-day retroactive period.